Table of Contents.

Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional and regulatory provisions involved	2
Statement of the case	3
Reasons relied on for the allowance of the writ	4
A. R.S.A. 390:13 is inconsistent with the rights of national banks granted by federal law and is thereby void under the Supremacy Clause	6
B. R.S.A. 390:13 denies to all plaintiffs the equal protection of the law and the due process of law secured by the Fourteenth Amendment	9
Conclusion	11
Appendix A	13
Appendix B	15

Table of Authorities Cited.

Cases.

Alper v. Las Vegas Hotel Ass'n, 74 Nev. 135, 325 P. 2d 767	10n.
Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028	11
First National Bank of Bay City v. Fellows ex rel. Union Trust Co., 244 U.S. 416, 37 S. Ct. 734	8
Franklin National Bank of Franklin Square v. New York, 305 N.Y. 453	6
Franklin National Bank of Franklin Square v. New York, 347 U.S. 373, 74 S. Ct. 550	5, 6, 7, 9
Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 57 S. Ct. 838	9

J & N Corp. v. Green Bay, 28 Wis. 3d 583, 137 N.W. 2d 434 10n.

Louisiana Motor Vehicle Commission v. Wheeling Frenchman, 235 La. 332, 103 S. 2d 464 10n.

M'Culloch v. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579 5, 8

New Hampshire Bankers Assoc. v. Nelson, 336 F. Supp. 1330 2

Rockingham Hotel Co., Inc. v. North Hampton, 101 N.H. 441, 146 A. 2d. 253 10n.

STATUTES, ETC.

U.S. Constitution, Supremacy Clause, Art. VI 2, 5, 6

U.S. Constitution, Fourteenth Amendment 2, 3, 6, 9, 11

12 U.S.C. 24 6

12 U.S.C. 92a 2, 3, 5, 7, 8

12 U.S.C. 248(k) 5

28 U.S.C. 1254(1) 2

28 U.S.C. 2201 3

28 Stat. 262, Acts of 1913, c. 6 8

New Hampshire R.S.A. 390:13 3, 6, 9, 11, 12

Washington R.C.W. 30.04260 4n.

Supreme Court of the United States.

OCTOBER TERM, 1972.

No.

NEW HAMPSHIRE BANKERS ASSOCIATION, MERCHANTS NATIONAL BANK, AMOSKEAG TRUST COMPANY, INDIAN HEAD NATIONAL BANK, BANK OF NEW HAMPSHIRE, N.A., KEENE NATIONAL BANK, STRAFFORD NATIONAL BANK AND THE EXETER BANKING COMPANY,
Plaintiffs,

v.

JAMES W. NELSON, BANK COMMISSIONER FOR THE STATE OF NEW HAMPSHIRE, AND WARREN B. RUDMAN, ATTORNEY GENERAL FOR THE STATE OF NEW HAMPSHIRE,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered herein.

Opinion Below.

The opinion of the Court of Appeals is attached hereto as Appendix A. It affirmed a judgment for the defendants entered by the United States District Court for the District of New Hampshire pursuant to an opinion of such District Court reported at 336 F. Supp. 1330.

Jurisdiction.

The judgment of the United States Court of Appeals was entered on May 24, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. May the State of New Hampshire prohibit the national bank plaintiffs from advertising the fact that they may serve as executors when they have been empowered to act as executors by state law and 12 U.S.C. 92a? Or otherwise stated, is not such a prohibition by the state inconsistent with the inherent rights of national banks and thereby void under the Supremacy Clause?

2. May the State of New Hampshire prohibit all plaintiff banks from advertising the fact that they may serve as executors without thereby denying such banks the equal protection of the law and the due process of law secured by the Fourteenth Amendment to the United States Constitution?

Constitutional and Regulatory Provisions Involved.

The principal constitutional provisions involved are the Supremacy Clause of the United States Constitution and

the Fourteenth Amendment (sec. 1) thereto. The principal statutory provisions are New Hampshire R.S.A. 390:13 and 12 U.S.C. 92a. These are all in Appendix B hereto.

Statement of the Case.

The plaintiffs are national banks and state-chartered trust companies located in the State of New Hampshire. Each plaintiff has an operating trust department and intends to place advertisements and distribute circulars in substantially the form shown in Appendix A to the complaint in order to publicize the fact that it may act as an executor as well as its other trust services (Complaint, ¶ 13). R.S.A. 390:13 provides, *inter alia:*

> "No such trust company or similar corporation or national bank shall advertise or circularize the fact that it is authorized to act as executor."

The Attorney General and the Bank Commissioner of the State of New Hampshire indicated that the proposed activities of the plaintiffs would result in their prosecution for violating the prohibitions of R.S.A. 390:13 (Answer, ¶ 15; Stipulation, ¶ 9). Thereupon the plaintiffs brought this complaint under 28 U.S.C. 2201 seeking a declaratory judgment that the provisions of R.S.A. 390:13 are repugnant to the Constitution and the laws of the United States on the grounds more particularly explained *infra.* The District Court sustained the validity of the statute and entered final judgment for the defendants. The plaintiffs appealed that judgment to the United States Court of Appeals for the First Circuit which affirmed the judgment of the District Court in a *per curiam* opinion and entered

judgment for the defendants on May 24, 1972. From this judgment the plaintiffs now appeal.

Reasons Relied on for the Allowance of the Writ.

This case affects all banks in New Hampshire, both national and state-chartered, which either have or intend to have trust departments. The prohibition on the effective solicitation of executorships deprives such banks of substantial business as stipulated by the parties and precludes the operation of efficient and full-service trust departments. The outcome of this case will also significantly affect national banks outside of New Hampshire. The State of Washington has an analogous statute [1] restricting the solicitation of trust business and the decision below will necessarily be considered precedent for upholding the validity of the Washington statute. In addition, the language of the Court of Appeals invites other states to impose similar restrictions on national banks.

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[1] Washington R.C.W. 30.04260:

"No trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills, or do other legal work for its customers, shall be permitted to act as executor, administrator or guardian; and any trust company or other corporation whose officers or agents shall solicit legal business *or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian* shall be ineligible for a period of one year thereafter to be appointed executor, administrator or guardian in any of the courts of this state.

"Any trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills, or do other legal work for its customers, and any officer, agent or employee of any trust company or corporation who shall solicit legal business *or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian* shall be guilty of a gross misdemeanor." (Emphasis added.)

The Court of Appeals in its *per curiam* opinion has blithely asserted a new principle of law with regard to national banks rooted in the outdated privilege-right dichotomy—namely, that, because a state may preclude a national bank from serving as an executor, it may regulate the conduct of such bank as an executor in any manner in which it sees fit. This doctrine, derived from no authority and articulated by the court *sua sponte* flies in the face of the clear holdings of the Supreme Court from *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819), to the present. Left standing, it can only encourage other state action not only in the trust area but in others (such as branch banking) where state law has been incorporated by federal statute. To say, as the Court of Appeals did, that a state may regulate a national bank trust department in any manner not involving discrimination *vis-à-vis* a state bank is to abandon the independent national banking system.

The decision of the Court of Appeals also repudiates the clear holding in *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373, 74 S. Ct. 550 (1954), in which this Court recognized that advertising is fundamental to the operation of a modern bank and that a national bank has a federal right to advertise all of its authorized activities. The court below purported to distinguish the *Franklin National Bank* case on the grounds that 12 U.S.C. 92a had not been enacted when the case was decided and thus the court could not have included section 92a in footnote 7 in referring to statutes where Congress has made local restrictions applicable. Nothing could be more wrong since the present language of section 92a was then contained verbatim in 12 U.S.C. 248(k) and had been in effect since 1918.

The claim of invalidity rests upon the Supremacy Clause and upon the interrelated grounds of denial of due process of law and of the equal protection of the law secured by the

Fourteenth Amendment alleged in plaintiffs' complaint. Each is discussed below.

A. R.S.A. 390:13 is Inconsistent with the Rights of National Banks Granted by Federal Law and is thereby Void under the Supremacy Clause.

In New Hampshire R.S.A. 390:13, national banks and state trust companies have been granted the authority to serve as executors in New Hampshire. The plaintiff national banks have been granted permission by either the Federal Reserve Board or the Comptroller of the Currency to conduct a trust department and to serve as executors and trustees. Complaint, ¶ 3, ¶ 5 through ¶ 8; Answer, ¶ 3, ¶ 5 through ¶ 8. The effect of R.S.A. 390:13 is, in the words of Judge Fuld, "like telling a property owner that he may produce vegetables but must not water or cultivate them." *Franklin National Bank of Franklin Square* v. *New York*, 305 N.Y. 453.

Plaintiffs submit that having the clear power to serve as executors they have a right to advertise that fact by virtue of the incidental powers granted to national banks by Congress under 12 U.S.C. 24. As the Supreme Court stated in the *Franklin National Bank* case:

> "Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. . . . [T]hey must be deemed to have the right to advertise [their right to receive savings] . . . ." 347 U.S. at 377-378, 74 S. Ct. at 553-554.

The opinion of the District Court below stated that this statement was *dicta*. To the contrary, the court had to find

that a federal right to advertise existed in order to conclude that the New York prohibition on such advertising conflicted with federal law. While there was an element of discrimination present in the *Franklin National Bank* case, the Supreme Court in no way relied upon this factor in establishing a basic federal right to advertise. Rather, the Court viewed the right to advertise as a necessity in the modern commercial world. The plaintiffs submit a national bank may advertise its executor functions as well as its savings department.

Section 92a(a) contains the phrase "when not in contravention of State . . . law." The court below relied upon this phrase to conclude that section 92a(a) incorporated by reference all state law restrictions upon the exercise of trust powers. The legislative history of this phrase is clear --the phrase was inserted in 1918 to preclude the states from enacting statutes which specifically denied trust powers to national banks while granting them to state banks. Thus clause (b) of section 92a states:

> "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section."

The phrase goes only to whether a national bank may exercise trust powers at all. It does not relate to the manner in which those powers, once granted, are exercised.

That Congress did not intend the state to have such control over a national bank function is abundantly clear from the statute itself and from the legislative history. Section 92a specifically authorizes certain trust department records to be examined by state authorities, validates certain state

minimum capital requirements and permits national banks to comply with certain state security deposit requirements. If the court below is correct, there would be no need for subsections (c), (f) and (i) of section 92a. Furthermore, the specific references to two state law requirements indicates, under the doctrine of *inclusio unius est exclusio alterius*, that Congress intended that no other state law restrictions apply.

The legislative history reveals that prior to 1918 the Federal Reserve Board was empowered:

> "To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds under such rules and regulations as the said Board may prescribe." 28 Stat. 262, Acts of 1913, c. 6.

Thus, as the Supreme Court noted in *First National Bank of Bay City* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 426-427, 37 S. Ct. 734, 738 (1917), the Board had the "power to adopt rules regulating the exercise of the functions conferred . . . ." Then in 1918, Congress was confronted with judicially sanctioned discrimination against national banks' trust departments by states passing laws allowing state banks to serve as fiduciaries but expressly denying national banks that right. Consequently, Congress revised the statute and added the language now found in section 92a (b) narrowly defining the phrase "when not in contravention of State . . . law" so as to preclude such state action. There is nothing to indicate, however, that Congress intended to vest control of the exercise of such functions in the states. Rather, they specifically provided for certain state requirements to govern and otherwise left the situation to be governed by the principles of *M'Culloch* v. *State of Maryland, supra.*

Plaintiffs, naturally, admit that nondiscriminatory state requirements which do not unreasonably interfere with the operation of a national bank would be permitted under the rules established by this Court in *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459, 57 S. Ct. 838 (1937). Plaintiffs submit that the *Franklin National Bank* case holds that a restriction on advertising does unreasonably interfere with national banks and is thereby not a permissible state restriction.

B. R.S.A. 390:13 Denies to All Plaintiffs the Equal Protection of the Law and the Due Process of Law Secured by the Fourteenth Amendment.

New Hampshire has singled out banks from the class of persons authorized to act as executors and ordered a cloak of silence drawn around their ability to serve as executors. Plaintiffs submit that there is no reasonable basis for such a distinction.

The lower court suggested that prevention of monopoly was a rational basis but the facts demonstrate that in states where banks do advertise they receive little more than 25 per cent of the executorships. Stipulation, ¶ 3, ¶4 and ¶ 5. The fear of monopoly is nothing but the "fanciful conjecture" condemned by this Court in *Hartford Steam Boiler, supra.* The court also suggested that a policy favoring personal contact with the testator justified the statute; yet the court ignored the fact that banks may advertise their services as trustees—positions of long term trust requiring perhaps even more intimate knowledge of the needs of beneficiaries and donors. Nor is the fact that practicing lawyers are barred by the canons of ethics from advertising of constitutional significance. Banks as a matter of course advertise all of their other services as does any competitive business. To apply the peculiar ethics developed by the

legal profession over centuries (and for primarily intra-professional reasons) would be absurd and would not be reasonably related to the general welfare. The plaintiffs suggest that none of the rationale suggested below passes constitutional muster.

The plaintiffs also submit that this statute is arbitrary in that it bears no reasonable relation to the public welfare. Just as there is no apparent reason for restricting only banks from advertising the fact that they may serve as executors, there is no reason why the right to advertise this fact should be denied anyone. This is not an area where aesthetics, traffic problems or problems of fair trade practices come into play. Such evils have justified restrictions on billboards, signs, and price advertising by hotels,[2] but the plaintiffs ask what evil is associated with informing someone of the fact that a bank may serve as his executor? Far from being inimical to the public good, advertising by banks concerning executors serves the public well. It does so by making testators conscious of the dangers of intestacy as well as of the merits of a full-time professional corporate fiduciary. This prompts fewer intestacies, planned estates which better reflect the deceased's wishes, and even, ironically, more business for the legal profession in the drafting of such wills. In all other states this form of advertising is carried on with no definable adverse effects; indeed, the advertising of foreign banks reaches well into New Hampshire (Stipulation, ¶ 7).

The basic inconsistency in the statute further demonstrates its arbitrariness. It permits banks to advertise their services as trustees but not as executors. The plaintiffs

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[2] See, *e.g.*, *Rockingham Hotel Co., Inc.* v. *North Hampton*, 101 N.H. 441, 146 A. 2d 253 (1958); *Alper* v. *Las Vegas Hotel Ass'n*, 74 Nev. 135, 325 P. 2d 767 (1958); *Louisiana Motor Vehicle Commission* v. *Wheeling Frenchman*, 235 La. 332, 103 S. 2d 464 (1958); *J & N Corp.* v. *Green Bay*, 28 Wis. 3d 583, 137 N.W. 2d 434 (1965).

submit that there is no rational distinction between the two functions which would justify this treatment. Even the court below could offer none. This only confirms that the statute has one and only one design—the enrichment of the members of the bar.

The court below relied upon *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028 (1963), to support the contention that the fact that lawyers are favored by a statute does not mean the statute is constitutionally defective. In *Ferguson* the court correctly determined that the existence of substantial legal questions in the practice of debt adjusting justified Kansas in limiting that field to lawyers. *Ferguson* might support the proposition that nonlawyers could be denied the right to serve as executors, but it is irrelevant to the issue of whether one having that right may inform the public of that fact. *Ferguson* does not stand for the proposition that it is constitutionally acceptable to favor lawyers, but merely that certain quasi-legal functions may be reserved exclusively to members of the bar, just as certain medical functions are reserved to other groups of licensed practitioners. Note, however, that an executor need have no particular skills, and lay persons are appointed as executors as an everyday occurrence.

The plaintiffs submit that R.S.A. 390:13 is a protectionist statute passed for the exclusive benefit of the members of the bar. The day has long since passed when the economic interests of a small class can, in the guise of state regulation, be preferred to those of the public. R.S.A. 390:13 clearly violates the Fourteenth Amendment guarantees of both equal protection of the law and due process of law.

Conclusion.

The decision of the Court of Appeals means that New Hampshire banks may still not inform the public of the full

range of the services they can perform. R.S.A. 390:13 harasses and interferes with the operation of national banks and denies to all banks the due process of law and equal protection of the law guaranteed by the Constitution. We respectfully submit that the questions presented are substantial and of public importance transcending the New Hampshire experience. We respectfully request that the Supreme Court of the United States grant certiorari to review the judgment of the Court of Appeals entered in the case.

Respectfully submitted,

KIMON S. ZACHOS,
Counsel for Plaintiffs.

SHEEHAN, PHINNEY, BASS & GREEN,
WM. S. GREEN,
JON S. RICHARDSON,
Of Counsel.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1049.

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK and
THE EXETER BANKING COMPANY,
PLAINTIFFS, APPELLANTS,

v.

JAMES W. NELSON, BANK COMMISSIONER
FOR THE STATE OF NEW HAMPSHIRE AND
WARREN B. RUDMAN, ATTORNEY GENERAL
FOR THE STATE OF NEW HAMPSHIRE,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

William S. Green, with whom *Jon S. Richardson* and *Sheehan, Phinney, Bass & Green* were on brief, for appellants.
Donald W. Stever, Jr., Assistant Attorney General, with whom *Warren B. Rudman*, Attorney General, was on brief, for appellees.

May 24, 1972.

PER CURIAM. Appellants, national and state banks and a banker's association, challenge that part of New Hampshire Revised Statutes Annotated, Chapter 390:13 which prohibits any bank from advertising or circulating the fact that it is authorized to act as an executor. The national banks and the association rely principally on the ground that the New Hampshire statute is repugnant to 12 U.S.C. § 92(a), which authorizes national banks to act as executors under certain circumstances. Additionally, all of the appellants assert due process and equal protection claims. We affirm on the basis of the thoughtful opinion below, 336 F.Supp. 1330 (D. N.H. 1972), but add a brief comment as to the claimed repugnancy.

Appellants' reliance on *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), is misplaced. The grant of federal authority there at issue, the power to receive savings deposits, 12 U.S.C. § 24, Seventh, made no reference to state law, a circumstance which the Court emphasized by contrasting it with several other sections making explicit reference to state law. 347 U.S. at 378 & n. 7. *See also First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969); *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Although § 92(a) had not been passed when *Franklin National Bank* was decided, and could not therefore have been included in the Court's footnote, it resembles the sections referred to there in that it conditions the right to act as executor on state law. Implicit in the state's power to proscribe national banks from acting as executors, we think, is the power to permit them to act as exectuors while precluding them, in a non-discriminatory way, from advertising that fact.

The judgment is affirmed.

Appendix B.

U.S. Constitution, Article VI.

. . . . . .

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

. . . . . .

U.S. Constitution, Sixth Amendment. Article XIV.

Declared Ratified July 28, 1868

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 12 U.S.C.

§ 92a. Trust powers.

(a) Authority of Comptroller of the Currency.

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks

applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law.

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records and assets.

National banks exercising any or all of the powers enumerating [1] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

[1] So in original.

(d) Prohibited operations; separate investment account; collateral for certain funds used in conduct of business.

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) Lien and claim upon bank failure.

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Deposits of securities for protection of private or court trusts; execution of and exemption from bond.

Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) Officials' oath or affidavit.

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in

any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) Loans of trust funds to officers and employees prohibited; penalties.

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) Considerations determinative of grant or denial of applications; minimum capital and surplus for issuance of permit.

In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: *Provided,* That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Surrender of authorization; board resolution; Comptroller certification; activities affected; regulations.

Any national banking association desiring to surrender its right to exercise the powers granted under this section,

in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory,[2] administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estate of lunatics or other fiduciary, under court, private, or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Upon the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein. (Pub. L. 87-722, § 1, Sept. 28, 1962, 76 Stat. 668.)

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[2] So in original.

390:13 Power to Act as Fiduciary. Any trust company or similar corporation, incorporated under the laws of this state, or any national bank duly authorized and located within the state, may be appointed trustee or executor in any case where an individual can be appointed, upon the same conditions and subject to the same control requirements, and penalties. No such trust company or similar corporation or national bank shall advertise or circulate the fact that it is authorized to act as executor.

Any trust company organized under the laws of New Hampshire may be authorized and empowered to act as receiver, assignee or agent for any person, firm, association or corporation, public or private; and in all proceedings in court or elsewhere in relation to such trusts or agencies, all accounts and other papers may be signed and sworn to in behalf of the corporation by any officer duly authorized.

Nothing herein contained shall affect the rights of religious, charitable, and eleemosynary corporations organized under the laws of New Hampshire to act in fiduciary capacities, or extend to corporations other than trust companies and similar corporations, or any national bank duly authorized and located within the state, power to act in a fiduciary capacity.

LE COPY

72-303

AUG 24 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK and
THE EXETER BANKING COMPANY,
Petitioners,

v.

JAMES W. NELSON, Bank Commissioner
for the State of New Hampshire, and
WARREN B. RUDMAN, Attorney General
for the State of New Hampshire,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF FOR THE CORPORATE TRUSTEES ASSOCIATION OF WASHINGTON

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SUBJECT INDEX

	Page
Statement of Interest	1
Argument	3
I. The Issues	3
II. The Position of *Amicus Curiae*	4
1. 12 USC 92a Does Not Authorize the Statutes to Determine the Manner in Which National Banks May Seek Trust Business	4
2. The Application of RSA 390:13 (and RCW 30.04.260) Exclusively to Corporate Fiduciaries Constitutes an Arbitrary Classification and Thus a Denial of the Equal Protection of the Law and a Denial of Due Process of Law as Guaranteed by the Fourteenth Amendment	7
3. There Is a Public Injury Resulting From the Prohibition of RSA 390:13	8
Summary	9

TABLES OF AUTHORITY

Table of Cases

Davis v. Elmira Savings Bank, 161 U.S. 275, 16 S. Ct. 502 (1896) 7

Fidelity National Bank and Trust Company of Kansas City v. Enright, 264 Fed. 236 (D.C.W.D. Mo. 1920) .. 7

First National Bank of Bay City v. Fellows, 244 U.S. 416, 37 S. Ct. 734 (1917) 7

First National Bank of Logan v. Walker Bank and Trust Co., 385 U.S. 252, 87 S. Ct. 492 (1966) 6

Franklin National Bank of Franklin Square v. New York, 347 U.S. 373, 74 S. Ct. 550 (1954) 5, 6, 9

Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969) 7

Constitutional Provisions

Page

United States Constitution, Amendment XIV 3, 7

Statutes

RCW 30.04.260 .....2-3, 4, 7, 8

RSA 390:13 .....2, 3, 4, 7, 8

12 USC § 36 (44 Stat. 1228) 6

12 USC 92a (Pub. L. 87-722 § 1, 76 Stat. 688) 3, 4, 5, 9

Other Authority

Rule 42(1) 1

U.S. Bureau of the Census, *Census of Population 1970, General Social and Economic Characteristics Final Report PC (1)-C49, Washington*, pp. 49-139 8

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK and
THE EXETER BANKING COMPANY,
Petitioners,

v.

JAMES W. NELSON, Bank Commissioner
for the State of New Hampshire, and
WARREN B. RUDMAN, Attorney General
for the State of New Hampshire,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF FOR THE CORPORATE TRUSTEES ASSOCIATION OF WASHINGTON

The Corporate Trustees Association of Washington, by Lyman W. Hull, its attorney, submits this brief as *Amicus Curiae* under Rule 42(1) of this Court.

STATEMENT OF INTEREST

The Corporate Trustees Association of Washington (hereinafter "the Association") is an unincorporated asso-

ciation composed of eight domestic national banks, one California-based national bank, six state banks and one mutual savings bank, all exercising trust powers. The purposes of the Association are to conduct educational programs for the assistance of the trust staff of member banks, to disseminate information on developments in trust administration and to foster legislation that will provide improved trust services for the public.

All banks which are actually doing a general trust business in the State of Washington are members of the Association which has now been in existence for more than 25 years. Two trust companies not doing a general trust business are not members.

The Association's members have an interest in this action because the statute law of the State of Washington places a restriction on them which is comparable to the provisions of New Hampshire RSA 390:13. The pertinent Washington statute is RCW 30.04.260, which provides as follows:

> "No trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills, or do other legal work for its customers, shall be permitted to act as executor, administrator or guardian; and any trust company or other corporation whose officers or agents shall solicit legal business *or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian* shall be ineligible for a period of one year thereafter to be appointed executor, administrator or guardian in any of the courts of this state.
>
> Any trust company or other corporation which advertises that it will furnish legal advice, construct or prepare wills or do other legal work for its customers, and any officer, agent or employee of any trust company or corporation who shall solicit legal business

or personally solicit the appointment of such trust company or corporation as executor, administrator or guardian shall be guilty of a gross misdemeanor." [Emphasis Added]

The nature of the penalties has made this statute essentially self-enforcing. No action has ever been known to have been brought for judicial enforcement. Consequently, there has never been a judicial construction of the statute's scope or validity. The Corporate Trustees Association of Washington believes that a determination on the merits of the validity of New Hampshire RSA 390:13 will determine a substantial number of the issues which would be raised by an action for declaratory judgment on RCW 30.04.260.

Therefore, the purpose of this brief is to underscore the importance of issues raised by Petitioners, and to express the deep concern of the Association that the opinion of the Court of Appeals may invite further restraints on the ability of banks in this state to carry out their important fiduciary functions.

ARGUMENT

I. The Issues

The issues to which this Brief will be addressed are:

1. Whether 12 U.S.C. 92a (§1 of Pub. L. 87-722, 76 Stat. 688, Act. of September 28, 1962) authorizes the States to determine the manner in which national banks may seek trust business.

2. Whether the application of RSA 390:13 (and RCW 30.04.260) exclusively to corporate fiduciaries constitutes an arbitrary classification and thus a denial of the equal protection of the law and a denial of due process of the law as guaranteed by the Fourteenth Amendment.

3. Whether there is a public injury flowing from the prohibitions of RSA 390:13 (or RCW 30.04.260).

II. The Position of *Amicus Curiae*

1. *12 U.S.C. 92a Does Not Authorize the ~~Statutes~~ STATES to Determine the Manner in Which National Banks May Seek Trust Business.*

Amicus Curiae take the view that 12 U.S.C. 92a forecloses the states from regulating the manner in which national banks acquire trust business. The Act provides in pertinent part:

> "(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, *when not in contravention of state or local law*, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which state banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located." [Emphasis Added]

The Act further states:

> "(b) Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies or other corporations which compete with national banks, *the granting to and the exercise of such powers by national banks* shall not be deemed to be in contravention of state or local law within the meaning of this act." [Emphasis Added]

The contrary view to ours, that states may prohibit advertising, circularizing or personally soliciting, *or all three*, would permit the states to virtually cripple a federal franchise, namely the right to exercise trust powers under the

authority of the National Banking Act. The issue was clearly resolved against Respondents in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 74 S. Ct. 550 (1954).

The opinion of the District Court (336 F. Supp. 1330), as adopted by the Court of Appeals illustrates, perhaps inadvertently, the lack of a valid state reason to justify interference in this aspect of national bank affairs: The District Court concluded that advertising and circularizing were forbidden practices because the New Hampshire Legislature may have thought that "the appointment of an executor should be the result of personal contact and a personal relationship rather than stem from advertising promotions and slogans." (336 F. Supp. at p. 1338). Yet the Washington legislature concluded the opposite for it forbids the bank from initiating personal contact, but does not expressly forbid advertising or circularizing.

Surely, Congressional policy of chartering national banks to engage in trust business is frustrated if they may not make an important segment of their powers known.

The deference paid to state law in 12 U.S.C. 92a relates only to *entry* into the trust field. It clearly renounces that deference in respect to the *exercise* of trust powers. Moreover, the deferential language of 12 U.S.C. 92a should be narrowly construed lest a broad construction lead to a fatal confrontation between federal and state law.

The Court of Appeals has fashioned an entirely new theory of federal-state relationships in the form of an implied state power which supersedes a reservation of federal power. We believe that the Court of Appeals is wrong and

that its decision will confuse the jurisdictional lines between the states and the federal government.

The District Court opinion and the Per Curiam opinion of the Court of Appeals have also erroneously extended the "competitive equality" doctrine of the McFadden Act, (44 Stat. 1228, 12 U.S.C. §36), beyond its proper scope. Drawing on *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S. Ct. 492 (1966), the District Court concludes that Congress was "ever seeking to keep national banks and state banks on the same basis of 'competitive equality'" (336 F. Supp. 1334). This is true only where Congress has expressly chosen a course of deference to state policy. The unequal elements of the dual banking system are numerous. The true historical course and perhaps greatest source of strength and public benefit in the dual banking system has been the game of leap frog played annually between Congress and the state legislatures in innovating powers for their respective institutions.

A truly parallel inquiry to the present case would be whether the McFadden Act authorizes the states to regulate the manner in which national banks solicit business through its branches. Clearly, the express power of the states to determine the establishment of branches does not carry with it the implied power to regulate advertising for business at those branches. *Franklin National Bank of Franklin Square v. New York, supra.*

We think that this case is clearly governed by *Franklin National Bank*, and thus that the Court of Appeals has decided an important federal question in conflict with an applicable decision of this Court.

See also *Davis v. Elmira Savings Bank*, 161 U.S. 275, 16 S. Ct. 502 (1896); *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 37 S. Ct. 734 (1917), *Fidelity National Bank and Trust Company of Kansas City v. Enright*, 264 Fed. 236 (D.C.W.D. Mo., 1920).

2. *The Application of RSA 390:13 (and RCW 30.04.260) Exclusively to Corporate Fiduciaries Constitutes an Arbitrary Classification and Thus a Denial of the Equal Protection of the Law and a Denial of Due Process of Law as Guaranteed by the Fourteenth Amendment.*

There is no discernible public interest which is protected by prohibiting advertising by persons who are trained in probate procedure and administartion and are heavily regulated in performing it, but permitting advertising by persons who are unregulated and untrained. Yet this is the result of RSA 390:13. Logically, if there is to be a state policy on this point it should be the reverse of what now prevails in Washington and New Hampshire.

The blunt effect of RCW 30.04.260 is to prevent a trust officer from addressing a customer (or even the customer's attorney) with the simple request that when the customer draws his will he consider the benefits of naming the bank as executor. The sole and, we submit, arbitrary purpose of this prohibition is to insulate and protect the substantial control already exercised by counsel over the choice of executor. It furthers no other cause. It is "invidious discrimination" which penalizes a constitutionally protected right of expression and hence may not survive unless necessary to protect a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1969). An adjudication of this point by the Court as to RSA 390:13 would substantially resolve the validity of RCW 30.04.260.

3. *There Is a Public Injury Resulting From the Prohibition of RSA 390:13.*

The position of *Amicus Curiae* is that there is a public injury in the prohibitions of RSA 390:13 and its Washington counterpart, RCW 30.04.260. The injury is a denial of ready access to information about a valuable service.

Amicus Curiae believe that the public desires to know the services which may be available to protect and administer their estates for the benefit of their families. The law should accommodate them. The development and expansion of trust services and administrative techniques by corporate fiduciaires is continuous and reflects the increasing complexity of accounting, tax and related aspects of contemporary personal and corporate finance.

The public's lack of understanding about the probate process has been ably demonstrated in recent years through the emergence of "do-it-yourself" probate schemes. A prohibition against advertising by corporate fiduciaries contributes to the lack of understanding and hence to a greater risk of intestacies and unintended dispositions of property. This risk is aggravated during periods of unusually rapid economic growth and population influx as there was in Washington during the 1960's.[1]

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1. During the period 1960-1970 the State of Washington experienced a population growth from 2,853,214 in 1960 to 3,409,169 in 1970. The number of families earning an annual income of $15,000 to $24,999 grew from 23,920 families in 1959 to 157,693 families in 1969; the number of families earning $25,000 or more grew from 8,269 in 1959 to 38,994 in 1969. The median family income in this state grew from $6,225 to $10,407. Source: U. S. Bureau of the Census, *Census of Population 1970, General Social and Economic Characteristics Final Report PC (1)-C49, Washington*, page 49-139.

SUMMARY

The opinion of the Court of Appeals is in direct conflict with *Franklin National Bank of Franklin Square v. New York, supra*, and the plain meaning of 12 U.S.C. 92a and creates serious new questions of jurisdiction between the states and the Federal Government over banks and trust companies. Moreover, there is no suggestion in the record that allowing New Hampshire banks to add the word "executor" to their advertised list of trust services would jeopardize the welfare and safety of the people of that state. Accordingly, we respectfully urge the Supreme Court of the United States to grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

HODGE & DAHLGREN, INC. P.S.
LYMAN W. HULL
Counsel for Amicus Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
ARGUMENT	2
I. ISSUANCE OF THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISIONS OF THE SUPREME COURT OR ANY OTHER COURT OF APPEALS, OR WITH ANY APPLICABLE STATE LAW	2
II. THE DECISION DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW AND HAS NO SIGNIFICANT IMPACT. THERE WAS NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS	4
III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

	PAGE
Ferguson v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)	5
Franklin National Bank of Franklin Square v. *New York*, 347 U. S. 373, 74 S. Ct. 550 (1954), 98 L. Ed. 767, 772 (1954)	2, 3, 5
Investment Company Institute v. *Camp, Comptroller*, 274 F. Supp. 624, 640, (D.D.C., 1967), 420 F.2d 624, (D.C.Cir., 1968), 401 U.S. 617 (1970)	3
McCulloch v. *State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819)	2
New Hampshire Bankers Association, et al v. *James W. Nelson, et al*, ___ F.2d ___, #72-1049 (1st Cir., 1972)	1
New Hampshire Bankers Association, et al v. *James W. Nelson, et al*, 336 F. Supp 1330 (D.N.H., 1972)	1, 5

STATUTES, ETC.

New Hampshire RSA 390:13	2, 4, 5
New York §258 (1)	2
Washington R.C.W. 30.04260	4
12 U.S.C. §24 seventh	3
12 U.S.C. §92a (a) and (b)	3, 5
12 U.S.C. §371	3

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-303

NEW HAMPSHIRE BANKERS ASSOCIATION,
MERCHANTS NATIONAL BANK,
AMOSKEAG TRUST COMPANY,
INDIAN HEAD NATIONAL BANK,
BANK OF NEW HAMPSHIRE, N.A.,
KEENE NATIONAL BANK,
STRAFFORD NATIONAL BANK
and the
EXETER BANKING COMPANY,

Plaintiffs,

vs.

JAMES W. NELSON, Bank Commissioner for the State of New Hampshire, and
WARREN B. RUDMAN, Attorney General for the State of New Hampshire,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR DEFENDANTS IN OPPOSITION

OPINIONS BELOW

The opinions of the courts below are as follows:

New Hampshire Bankers Association, et al v. *James W. Nelson, et al*, ___ F.2d ___, #72-1049, (1st Cir., 1972); *New Hampshire Bankers Association, et al* v. *James W. Nelson, et al*, 336 F. Supp. 1330 (D.N.H., 1972).

ARGUMENT

I. ISSUANCE OF THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISIONS OF THE SUPREME COURT OR ANY OTHER COURT OF APPEALS, OR WITH ANY APPLICABLE STATE LAW.

Initially, it is obvious that the decision of the Court of Appeals does not conflict with any state law applicable to the subject matter of the decision. The decision upheld a state statute, N.H. RSA 390:13, and there are no conflicting state decisions relative to the subject matter.

Secondly, there are no conflicting Court of Appeals decisions on the same subject matter. None have been cited by Plaintiffs, simply because the New Hampshire statute is unique. *Complaint,* ¶16; *Stipulation,* ¶1.

Plaintiffs attempt to show that the decision conflicts with decisions of the Supreme Court, and cite *McCulloch* v. *State of Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819) and *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 74 S. Ct. 550 (1954) in support of that argument. *Petition for Writ of Certiorari,* p. 5.

A close reading of the decision appealed from, the opinion of the District Court below, and the cases cited by Plaintiffs compels a conclusion that there is no conflict in substance, and that Plaintiffs' argument on the issue is without foundation.

Franklin National was a case of clear state discrimination against national banks. The New York statute, §258 (1) of the Banking Law, prohibited all banks other than New York chartered savings banks from using the word "savings" in bank advertising or doing any other thing related thereto. *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 374, 74 S. Ct. 550, 552, 98 L. Ed. 767, 772 (1954). The fatal defect in the statute was that it placed the national banks at a competitive disadvantage to certain state banks in a facet of their business as authorized by Congress.

Plaintiffs rely on broad dictum in the *Franklin National* opinion relating to the right to advertise, and the conclusion stemming therefrom that advertising is an implied or incidental power within the meaning of 12 U.S.C. §24 seventh. This dictum is not sufficient to support Plaintiffs' contention of conflict, because unlike the statute at issue in *Franklin National*, 12 U.S.C. §371, which makes only the interest rate paid on savings deposits subject to nondiscriminatory state law, 12 U.S.C. §92a (a) and (b) place the entire spectrum of trust powers under applicable nondiscriminatory state law. In substance, as the Court of Appeals noted, 12 U.S.C. §92a is like the statutes referred to in Footnote 7 to the *Franklin National* opinion, 347 U.S. at 378. If, assuming Justice Jackson's dictum is correct, advertising is an incidental power, then 12 U.S.C. §92a (a) and (b) make that power, along with the underlying trust powers, subject to state law. See *Investment Company Institute* v. *Camp, Comptroller*, 274 F. Supp. 624, 640 (D.D.C., 1967); rev'd on other grounds, 420 F.2d 624 (D.C.Cir., 1968); Dist. Ct. Aff'd 401 U.S. 617 (1970).

II. THE DECISION DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW AND HAS NO SIGNIFICANT IMPACT. THERE WAS NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

The issues involved in the case are peculiar to New Hampshire. What was litigated was a New Hampshire statute regulating one activity of New Hampshire domiciled banks advertising their executor services. In an attempt to show a broader impact, Plaintiffs now cite Washington R.C.W. 30.04260 and argue that the decision will somehow affect activities in the State of Washington. The Plaintiffs, however, stipulated earlier:

> "1. The State of New Hampshire is the only state in the United States which clearly prohibits banks from advertising their capacity to act as executors. The State of Washington has an ambiguous statute which *some banks interpret* to restrict their right to so advertise; *however, many banks in Washington do advertise their capacity to serve as executors.*" Stipulation, ¶1. (Emphasis added)

A close look at R.C.W. 30.04260 compels the conclusion that it is not analogous to N.H. RSA 390:13. Moreover, we have not found that the Washington statute has ever been challenged; and, as stipulated by Plaintiffs, it does not as a matter of fact prohibit advertising.

Plaintiffs also argue that the decision of the Court of Appeals will foster a flurry of new restrictive state legislation. The argument amounts to fanciful speculation. If it does in fact have that result, and if, as a result, there are court decisions conflicting with the decision in the present case, then perhaps the matter might be a bit more ripe for review. At present, however, the speculation of Plaintiffs is insufficient ground upon which to base a writ of certiorari.

Finally, Plaintiffs do not allege, and the record does not indicate, that the Court departed from the usual course of judicial proceedings, nor did anything of an extraordinary procedural nature.

III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

As discussed in Section I of this brief, the supremacy clause issue raised by Plaintiffs is based on an erroneous reading of *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), and ignores the clear language of 12 U.S.C. §92a. Both the District Court and the Court of Appeals recognized this, and the decision of the Court on the issue is clearly not open to question.

Similarly, there is no apparent error in the decision of the Court of Appeals on the due process and equal protection issues. The Court of Appeals upheld the finding of the District Court that RSA 390:13 did not create invidious discrimination, was not arbitrary, nor clearly unfair. 336 F. Supp. 1330, 1340 (D.N.H., 1972).

The District Court in its long and analytical opinion, applied to the facts the reasoning of *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). Plaintiffs do not argue that *Ferguson* v. *Skrupa* is not viable, or that this Court has abandoned it in economic regulation cases. There is, finally,

nothing to indicate that the Courts below applied its reasoning in an erroneous manner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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for the State of New Hampshire

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